Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UBALDO DIBENEDETTO

V.

COMMONWEALTH OF MASSACHUSETTS--
UNIVERSITY OF MASSACHUSETTS, BOSTON
AND
JAMES RYAN

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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SUPPLEMENTAL APPENDIX

The Appendix to the Petition is herewith supplemented by the inclusion herein of two parts of the appellate record in the Supreme Judicial Court of the Commonwealth of Massachusetts:

Trial Court Order For Judgment..... 1-10

Agreed Statement To Be Part
Of Record On Appeal..... 11-13

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. SUPERIOR COURT
CIVIL ACTION
NO. 44962

UBALDO DIBENEDETTO,
Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS - UNIVERSITY OF MASSACHUSETTS, BOSTON and JAMES RYAN,
Defendants

ORDER FOR JUDGMENT

After a six day trial in June of 1983 and after which a mistrial was declared on account of the jury's deadlock in attempting to arrive at a verdict, the case was re-tried. By agreement of the parties, the same special questions that had been submitted to the first jury were submitted to the second jury.[1]

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[1] (Petitioner's United States Supreme Court inclusion): See pages 11-13 , infra, for "Agreed Statement To Be Part Of Record On Appeal", which was part of record below, most particularly this clarification:

"During lengthy lobby conferences in the course of the first trial... plaintiff's counsel objected to the inclusion of special question 3 on the jury verdict sheet, regarding defendant Ryan's 'causation' of the hiring decision...."

(1) The plaintiff's case was tried under 29 U.S.C. §§621-634 which makes it "unlawful for an employer to fail or refuse to hire any individual because of such individual's age." (§621).

In accordance with Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), the jury was instructed that the plaintiff had the burden of proving that he was discriminated against because of his age and that his age was a determining factor in not being hired. The jury was also told to apply the so-called "but-for" test: But for his prospective employer's motive to discriminate against him on account of age, would he have been hired for the position for which he had applied? The jury found that the Commonwealth did not fail or refuse to hire the plaintiff because of his age (Question 1), the defendant Ryan discriminated against the plaintiff because of the plaitniff's age (Question 2), but that the Commownealth did

not fail or refuse to hire him because of Ryan's discrimiantion (Question 3).

Plaintiff's counsel is foregetful of why Question 3 was necessary. Persons other than Ryan were involved in the selection process to fill an employment vacancy. All parties had agreed that Ryan and all others involved in the hiring process were agents of the Commownealth acting within the scope of their authority and that the Dean had authority to hire the plaintiff. Ryan did not have that authority. Plaintiff's counsel, more than once, properly pointed out that the jury would be warranted in finding that the Commonwealth failed or refused to hire the plaintiff because of the conduct of persons other than Ryan. Had the jury answered Question 1 affirmatively that the Commonwealth failed or refused to hire the plaintiff because of his age, it would not necessarily have meant that it was because of Ryan's conduct.

Since plaintiff also wanted to get a judgment against Ryan and Ryan did not have the authority to hire, it was necessary for the plaintiff to specifically prove that someone failed or refused to hire him because of Ryan's discrimiantion. To hold otherwise would mean that non-causal discrimination in a vacuum is a basis for civil liability. That is not the law and plaintiff does not claim it to be. Ergo, Question 3.

Of course, as it turned out, the jury by answering Question 1 "No" made Question 3 unnecessary. Indeed, if Question 3 had been answered "Yes", it would have been inconsistent with the answer to Question 1. If the answer to Question 1 were "Yes", the answer "No" to Question 3 would have been consistent. The result would have been that the Commonwealth was liable but that Ryan was not liable. If both Questions 1 and

3 were answered "Yes", both the Commonwealth and Ryan would be liable.

Plaintiff argues forecefully that employees are liable as employers under the statute and has submitted numerous cases to that effect. This proposition of law has always been accepted by the court. An examination of the cited cases does not reveal that causation was an issue in any of the cases. None of those cases stand for the proposition that an employee is liable if he discriminates in the hiring process notwithstanding that the discrimination was not a determining factor.

Plaintiff has filed an affidavit to the effect that the jury thought that the plaintiff had won the case. Assuming that to be the case, at most the affidavit indicates that the jury may have not realized the conclusion to be drawn from the answers to the questions. There is

nothing to indicate that the jury did not understand the law as it applied to the evidence and to the facts found.

Plaintiff also claims that the wording of Question 3 was unclear and that the instrucitons on that question did not explain what the issue was or how the issue differed from that in Question 1. First, the language in Question 3 used the language of the statue "fail or refuse to hire", just as it was used in Question 1. The only difference was that Question 3 referred to Ryan's "discrimination." There was never any doubt that the case was being tried on the theory of age discrimination, and that was fully explained to the jury. Second, the jury had been instructed fully on the "but for" test in determining failure or refusal to hire. There was no need to repeat it again. Third, the language of the question in plain ordinary meaning asks

for causation. "Did the Commonwealth fail or refuse to hire the plaitniff because of... Ryan's discrimination?" (emphasis added). Fourth, no objection was ever made to the court about the clarity of any of the questions or of the instructions concerning them.[2] Fifth, the issue in question did not differ from Question 1 except as it related only to Ryan, and that was clear from the reading of the question.

To summarize, the answer to Question 1 indicates that the Commonwealth did not "fail or refuse to hire" the plaintiff because of his age. This answer, in and of itself, does not disclose whether the jury found a discriminatory motive, but it does necessarily indicate that discrimiantion was not a factor at all in the failure to hire the palintiff. The answer to Question 2 indicates that Ryan had a discriminatory

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[2]See petitioner's footnote 1, supra.

motive; and presumably, whatever Ryan did in the hiring process was tainted by his unlawful motive. The jury was instructed that the Commonwealth was bound by whatever Ryan did or failed to do. Nevertheless, the answers to both Questions 1 and 3 indicate that the Commonwealth did not fail or refuse to hire the plaintiff on account of any discriminatory motive of Ryan or any other employee of the Commonwealth.

Since the plaintiff failed to sustain his burden of proving that he failed to get employment on account of age discrimination by either Ryan or any other authorized agent of the Commonwealth, the prospective employer, judgment is to enter dismissing the plaintiff's complaint.

(2) The defendant filed a counterclaim alleging that the plaintiff had invaded his privacy by recording a telephone conversation in violation of G.L. c. 272, §99. The plaintiff admitted the violation

on two different occasions. At the trial the defendant submitted no evidence of actual damages. The jury assessed $1,000 as punitive damages. (Question 5).

Part Q of §99 provides for a civil remedy if there is violation of the statute. The person whose communications have been used in violation of the statute is entitled to recover from the violating person: "1. actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1,000, whichever is higher; 2. punitive damages; and 3. a reasonable attorney's fee and other litigation disbursements reasonably incurred..."

Although the defendant proved no actual damages, he is entitled to recover $1,000 as liquidated damages, $1,000 as punitive damages, a reasonable attorney's fee and other litigation disbursements

reasonably incurred. In open court the defendant waived any claim for an attorney's fee. Accordingly, judgment is to enter for the defendant on his counterclaim in the amount of $2,000 together with interest and costs.

By the Court,

/s/ *Chris Byron*
Chris Byron
Justice of Superior Court

DATED: June 25, 1984

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT
No. 44962

UBALDO DiBENEDETTO

v.

COMMONWEALTH OF MASSACHUSETTS, UNIVERSITY OF MASSACHUSETTS, BOSTON and JAMES RYAN

AGREED STATEMENT TO BE
PART OF RECORD ON APPEAL

Pursuant to M.R.A.P. 8(d), the parties hereby submit an agreed statement with regard to a portion of the evidence or proceedings in the litigation of this matter, to be included in the record on appeal. This statement is submitted as a result of a hearing held before the trial judge (Byron, J.) on April 24, 1985, for settlement and approval of plaintiff's statement (and defendant's response thereto) initially timely filed under M.R.A.P. 8(c). At that hearing, the parties were able to

reach an agreement, with the approval of the court, and were directed to file this Agreed Statement, replacing the documents filed under Rule 8(c).

1. During lengthy lobby conferences in the course of the first trial on this matter, held June 6-14, 1983, in which discussions took place on the matter of jury instructions and special questions for the jury in this age discrimination suit, plaintiff's counsel objected to the inclusion of special question number 3 on the jury verdict sheet, regarding defendant Ryan's "causation" of the hiring decision. At the outset of the second trial, in May, 1984, it was understood by the parties that the same ground rules would apply, including the form of the special questions. The second trial, was, in effect, to be almost a replay of the first.

2. The testimony of the plaintiff, Ubaldo DiBenedetto, was substantively the same at the first trial in June, 1983, as it was at the second trial in May, 1984, the transcript of which is on record.

3. Both the taped conversations between the plaintiff and the defendant Ryan, which were played to the jury and the transcripts of which were submitted into evidence, and the video-taped deposition of Professor Ricardo Navas-Ruiz, were submitted as evidence by the palintiff in identical substance in both trials.

/s/ Lawrence T. Bench
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/s/ Susan S. Riedel
Daniel F. Featherston, Jr.
Susan S. Riedel
141 Tremont Street
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DATED:

APPROVED:

By the Court,

/s/ Chris Byron
Chris Byron
Justice of Superior Court